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No. 90-1770

IN THE

Supreme Court of the United States

October 1990 Term

AMERNATIONAL INDUSTRIES INC.,

Petitioner,

against

ELECTROEXPORTIMPORT,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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Respondent's Brief in Opposition to Petition for Writ of Certiorari

Respondent, Electroexportimport ("EEI"), herewith respectfully submits this brief in opposition to the petition of Amernational Industries Inc. ("Amernational"), for a writ of certiorari.

Amernational's "Questions Presented"

Neither of the two questions presented by Amernational in its petition warrants review. Pursuant to Rule 17 of this Court's Rules, a review on writ of certiorari will be granted "only when there are special and important reasons there-

for." Factors controlling or measuring this Court's discretion include a federal Court of Appeals decision in conflict with the decision of another federal Court of Appeals on the same matter, or a decision on a federal question in conflict with a State Court of last resort, or a departure from accepted and usual judicial proceedings, or a State Court decision in conflict with applicable decisions of this Court.

The two questions posed by Amernational do not present any compelling grounds for review. Each can be answered conclusively by elemental research into the application of Rule 60(b), and do not require this Court's guidance, as no conflict in this area exists among the Circuits whatsoever. The answer to each question raised has been unqualifiedly resolved in the affirmative.

Statement of the Case

Amernational, throughout the history of this litigation, has tried to shortcut its way to a judgment by avoiding having to prove its alleged claim. Thus, it interposed a succession of motions for a default judgment. Eventually, its efforts succeeded, and Amernational was granted a default judgment in excess of eleven million dollars, which "damages" were based purportedly on a breach of contract with EEI that was valued, at best, at about one million dollars. The judgment was granted without submission of a scintilla of evidence supporting the alleged damages, except a self-serving affidavit of an officer of Amernational who clearly stated therein that the alleged claim for lost profits was only an "estimate," yet that estimate was trebled in the default judgment (Appendix "A" to petition, page 15). At all times relevant hereto, EEI was an agency or instrumentality of the foreign, sovereign state of Romania, and entitled to all the protections afforded by the

Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1602, *et seq.*, and, in particular, Section 1608(e), which provides:

> ". . . no judgment by default shall be entered by a Court of the United States or of a state against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court."

The reversal by the Sixth Circuit Court of Appeals of the lower Court's grant of the default judgment, is so squarely founded upon the facts and the law, and is in such close conformance with uniform law on the subject, that very little discussion is called for.

Amernational, again, apparently fearful of having to prove its case and give EEI its day in Court, now seeks the intervention of this Court under a scenario which has no relevance or materiality whatsoever. The decision of the Sixth Circuit has in no way prejudiced or foreclosed any of Amernational's rights, nor is it dispositive of the case. On the contrary, it re-opens the case, eliminates a default judgment that should never have been granted initially, and returns the parties to their proofs.

The eleven million dollar default judgment was purportedly entered to punish EEI for not timely responding to a Rule 34 document demand served in and about December, 1986. For over two years, no motion was made by Amernational with respect to that demand, no further demands for compliance were issued, and no other discovery devices of any sort were served by Amernational. Finally, Amernational filed a motion for a default judgment on March 17, 1989, which, itself, violated the District Court's scheduling

order setting December 31, 1988 as the cut-off date for filing of all motions.

At the hearing on Amernational's latest motion for a default judgment, a delegation from Bucharest, Romania traveled some eight thousand miles to assure the District Court that EEI would faithfully comply with all directives and scheduling orders (Appendix "A", page 7). The delegation included EEI's managing director, EEI's legal advisor, and a representative from the Foreign Trade Ministry. They appeared to give their personal assurances that all Court procedures and instructions would be diligently obeyed, to explain why the delays had occurred in the past, and to present EEI's meritorious defenses to the action. The District Court would not take any testimony in that regard (Appendix "M," pages 1-4). The record evidences that the District Court never found EEI to be acting with any degree of bad faith, but only that it was concerned that delays might allegedly prejudice Amernational (Appendix "M," page 5). As the Sixth Circuit held, delay itself is insufficient (Appendix "A", page 12). The only "prejudice" that would result was that Amernational would then have to prove its case.

The subject document demand (Joint Appendix, pages 55-66), was, itself, violative of Rule 34, and required production, in omnibus fashion, of "all documents" relating to dealings at any time between Amernational and any other Romanian entity, all long distance phone records since 1980, all expense vouchers for anyone acting on behalf of Action Tungsram, a party with whom Amernational settled under seal, all travel itineraries of EEI and Action Tungsram, all passports and visas of EEI's officers, employees, representatives, servants, etc., records of EEI's payment of attorneys' fees, actual samples of light bulbs, and so forth, none of which had any bearing on Amernational's burden of proof, and in no way affected its ability to sustain that

burden, which explained why it did nothing to pursue the document demand for over two years. Nonetheless, EEI did produce as much documentation as available, both informally, and under a formal Rule 34 response as well.

Although Amernational argues that EEI did not "appeal" the default judgment, EEI did move pursuant to FRCP Rules 55(c) and 60(b) to vacate the default judgment, which is a fully acceptable procedure. In a quite detailed and well reasoned analysis, the Sixth Circuit, by unanimous opinion, properly reversed the lower Court, finding that the District Court "clearly abused its discretion in denying Electro (i.e., EEI) relief from the default judgment" (Appendix "A", page 16). Nothing Amernational has presented warrants any interference with that decision.

REASONS FOR DENYING THE WRIT

I. There are No Special or Important Reasons for Granting Review

Amernational argues that this case "presents the opportunity for the Court to provide judicial guidance on the application of Rule 60(b) relief as it applies to default judgments imposed as Rule 37(b) discovery sanctions." We respectfully maintain that such guidance is unnecessary, as the law in this area is quite explicit and in full conformity.

Amernational seeks to carve out a distinction between default judgments entered for non-appearance, as opposed to those granted as a discovery sanction. Notwithstanding the underlying reason, a default judgment remains what it purports to be, a final judgment effectively adjudicating the merits unless set aside. Indeed, Amernational's default judgment entered by the District Court (Appendix "L") makes no such distinction, and does *not* specify that it is merely a "discovery sanction."

The Sixth Circuit specifically dealt with Amernational's argument that a "distinction" should be made, stating in clear and convincing terms:

> "Plaintiff argues that [t]he trial court's decision whether or not to set aside a default judgment entered as a sanction is governed by different considerations than those applicable to a default judgment entered for a defendant's non-appearance." Appellee's Brief at 14. *Not only does plaintiff fail to offer any authority to support its argument, but plaintiff also fails to explain how a belated response to a discovery request is a more egregious action than a belated pleading*—a context in which we have specifically applied the three-factor analysis set forth in *United Coin.* See *INVST Fin. Group v. Chem-Nuclear Systems,* 815 F.2d 391, 398 (6th Cir.), *cert denied,* 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987). Moreover, other courts have granted relief under Rule 60(b) from judgment entered as a discovery sanction. See *Kotlicky v. United States Fidelity & Guar. Co.,* 817 F.2d 6, 9 (2d Cir. 1987) (balancing policy of finality against policy favoring determination on the merits); *United States Artists Corp. v. Freeman,* 605 F.2d 854, 857 (5th Cir. 1979) (per curiam) (refusal to cooperate was due to confusion and ignorance); see also *United States v. Shipco General Inc.,* 814 F.2d 1011, 1013 (5th Cir. 1987) (refusing relief by applying factors similar to those in *United Coin).* Accordingly, we hold that the *United Coin* analysis applies to this case."
>
> (Appendix A, pages 11-12, emphasis supplied)

Not taking any well-needed enlightenment from the Sixth Circuit, Amernational repeats the same argument to

this Court, but likewise, fails to present any authority whatsoever for its position.

Jurisdiction to review appellate decrees by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or to secure uniformity of decision. *Forsyth v. Hammond,* 166 U.S. 506, 41 L.Ed. 1095 (1897); *Fields v. United States,* 205 U.S. 292, 27 S.Ct. 543, 51 L.Ed. 807 (1907); *Warner v. New Orleans,* 167 U.S. 467, 17 S.Ct. 892, 42 L.Ed. 239 (1897); *Magnum Import Co. v. Coty,* 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

Certiorari will not be granted except in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery Inc.,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Fields v. United States, supra; N.L.R.B. v. Pittsburgh SS Co.,* 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

Distinguishing between a default judgment entered for non-appearance and one entered as a discovery sanction is not an issue of substantial importance to the public. In fact, it was not even important to Amernational since, as stated, its own default judgment which it prepared does not indicate the reason why it was being issued, the reason obviously being irrelevant to the force and effect of the default judgment.

Amernational has not evidenced how the effect of default judgments differs in any way, or why they should be treated differently, depending on the reason for entry. Under Rule 55(a), an entry of default can be made for failure to plead or defend, or for failure to comply with Court orders. *Eisler v. Stritzler,* 535 F.2d 148 (1st Cir. 1976).

Amernational asks whether the standard for relief under Rule 60(b) to set aside a default judgment imposed under Rule 37, is the same as the standard when the default judgment was entered for non-appearance. That question has already been answered uniformly by the Circuits.

The default judgment entered against EEI, for whatever reason, was a final judgment adjudicating the action, and was viewed as such by Amernational, which moved for execution against assets of EEI, an agency or instrumentality of a foreign sovereign state, just as if Amernational had obtained a judgment after trial (Appendix "N" to petition).

Rule 60's requirements are explicitly set forth in subsections (a) and (b), and the standards are more stringent than an application under Rule 55(c). *Chrysler Credit Corp. v. Macino,* 710 F.2d 363 (7th Cir. 1983).

If the Congress felt that a distinction should be made because of the reasons for which a default judgment can be entered, it would have so stated in the Federal Rules. Rule 60 is applicable when moving to set aside *any* judgment, including a default judgment, whether granted for non-appearance, failure to defend, or as a discovery sanction.

Amernational wishes to re-write Rule 60 to suit its own private purposes. The Rule, however, is quite clear, and no alternative interpretations can be written into it.

The Sixth Circuit explained the criteria under Rule 60 to set aside a judgment by default, mainly, lack of prejudice to plaintiff, existence of a meritorious defense, and absence of willfulness of defendant which led to default (Appendix A, page 11). The Court, then, carefully examined each of those factors with a view toward determining whether the District Court properly exercised or abused its discretion.

Amernational argues that a consideration of defenses is irrelevant on a Rule 60 motion, and, once again, flies squarely in the face of established law. To justify a vacature of the default judgment under Rule 60(b), the movant *must* make a showing that he has a meritorious defense to the action. *Gomes v. Williams,* 420 F.2d 1364, 13 F.R. Serv. 2d. 1226 (10th Cir. 1970); *Central Operating Co. v. Utility Workers of America,* 491 F.2d 245 (4th Cir. 1974). Indeed, a meritorious defense is a "necessary predicate to the reversal of a denial of a Rule 60(b) motion." *Ralston Purina Corp. v. Navieras De Canarias S.A.,* 619 F.2d 152, 153, 29 F.R. Serv. 2d 714 (1st Cir. 1980).

Thus, Amernational's second "question presented," whether the merits may be reviewed on a Rule 60(b) motion, has also been adequately considered and answered already. The merits *must* be reviewed. The Sixth Circuit, in this case, held:

> ". . . we find absolutely no merit in plaintiff's position that the merits cannot be considered, and we are surprised that this argument prevailed in the District Court." (Appendix A, page 13).

Not surprisingly, Amernational presented no authority to the Sixth Circuit, and offers no authority to this Court either, for its argument.

II. The Only "Confusion" is Not Among the Circuits, But in Amernational's Way of Thinking

Certiorari is granted in cases where there is a *real and embarrassing conflict* of authority and opinion between the Courts of Appeals. *NLRB v. Pittsburgh S.S. Co., supra; Rice v. Sioux City Memorial Park Cemetery Inc., supra.*

The factors summarized by the Sixth Circuit have been uniformly followed by the other Circuits in reviewing whether an abuse of discretion occurred. See, for example, the Tenth Circuit in *Gomes v. Williams, supra,* the 4th Circuit in *Central Operating Co. v. Utility Workers of America, supra,* the 2nd Circuit in *Davis v. Musler,* 713 F.2d 907, 36 F.R. Serv. 2d, 1370 (2d Cir. 1983); the 3rd Circuit in *Diversified Utilities Sales Inc. v. Monte Fusco Excavating Contract Co., Inc.,* 71 F.R.D. 661 (E.D.Pa. 1976), and *Reid v. Liberty Consumer Discount Co.,* 484 F.Supp. 435, 28 F.R. Serv. 2d 1318 (E.D.Pa. 1980), and so on.

Amernational, on pages 16 and 17 of its petition, argues that the Third Circuit used a six-part test, as opposed to the Sixth Circuit's three-part test for review. Those six parts, as set forth in *Poulis v. State Farm Fire & Casualty Company,* 747 F.2d 863 (3rd Cir. 1984), obviously equate to the three part standard, and are merely an expansion upon themselves, those criteria being, 1) the party's personal responsibility; 2) prejudice to the adversary; 3) history of dilatory conduct; 4) willfulness or bad faith; 5) effectiveness of lesser sanctions; 6) meritorious claim or defense (747 F.2d at 868). There is absolutely no confusion or conflict whatsoever between the Sixth Circuit's test of prejudice, meritorious defense, and party's culpability, and the test in *Poulis.*

United Artists Corp. v. La Cage Aux Folles Inc., 771 F.2d 1265 (9th Cir. 1985), relied on by Amernational, is not in conflict with any Circuit, and deals with an appeal of a Rule 37 dismissal of the complaint. In fact, that Court did not even consider the Rule 60(b) motion (771 F.2d at 1271).

Likewise, *C.K.S. Engineers Inc. v. White Mountain Gypsum Co.,* 726 F.2d 1202 (7th Cir. 1984), cited by Amernational, conforms to uniform precedent. Refusing to carve

out distinctions, the Court, there, stated that a "decision on a Rule 60(b) motion is subject to the *same* abuse of discretion standard of review in the default judgment context as in any other context." (726 F.2d at 1205, citing, *Inryco Inc. v. Metropolitan Engineering Co.*, 708 F.2d 1225 (7th Cir. 1983)). That Court also pointed to the necessity of a meritorious defense on a Rule 60(b) motion, together with the even more essential factor of a legitimate excuse for the default (at 1208). Thus, *C.K.S. Engineers* is in complete conformity with the analysis of the Sixth Circuit in this case.

Again, Amernational's citation of *Securities and Exchange Commission v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982), follows the established law, rather than presenting a conflict, and holds that review of the merits is required, together with a showing of excusable neglect (at 416).

In fact, the cases cited by Amernational do not represent any conflict imaginable. Each is based on quite different fact patterns. Each generally holds that one factor alone is insufficient when considering a lower Court decision within the scope of appellate review. All the Circuits, however, agree as to what those factors are. The emphasis is determined by the particular facts of the case and the subsection of Rule 60 under which a party is moving.

Simply because the defaulting party has a meritorious defense, that, alone, would not get him "off the hook," as Amernational artfully phrased it on page 20 of its petition. The movant under Rule 60(b) still has to meet the other criteria as uniformly established in every Circuit.

Amernational wishes to reverse the entire body of law in this area, and, indeed, turn Rule 60 on its head. Amernational has not demonstrated any confusion or conflict

among the Circuits in this matter, but, instead, offers its own theories and speculation as to what the law "should" be, absent the slightest authority or support. Amernational is merely unhappy with the Sixth Circuit's decision vacating the default judgment, and tries to create a fanciful and incredible scenario of supposed conflict where, in reality, none exists, to try to persuade this Court to grant the petition.

Amernational, on page 19, even misstates Rule 37(b), by asserting that the procedure for imposing default judgments as sanctions involves, merely, issuance of an order and failure to obey the order. In fact, it involves much more than that simple pattern. Amernational conveniently omitted the essential requirement necessary to impose the drastic sanction of last resort, mainly, willful, bad faith conduct. *Kozlowski v. Sears, Roebuck & Co.*, 71 F.R.D. 594, 21 F.R. Serv. 2d 1372, motion denied, 73 F.R.D. 73, 22 F.R. Serv. 2d 1008 (D.C.Mass. 1976); *Sieck v. Russo*, 869 F.2d 131, 13 F.R. Serv 3d 67 (2d Cir. 1989). Just as Amernational has misinterpreted Rule 37(b), that same mistaken view permeates Amernational's discussion of Rule 60(b).

The criteria for setting aside default judgments under Rule 60(b), and the scope of review of such decisions, are uniformly applied throughout the Circuits. The fears raised by Amernational are illusory and of its own making. The order of the Sixth Circuit poses no conceivable threat whatsoever to the control of discovery by the District Courts. On the contrary, it corrected an abuse of discretion, which is exactly the function of appellate review. The order was proper in all respects, and no genuine basis to grant the petition has been presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
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